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MICHAEL RODAK, JR., C

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1441

CONTRA COSTA COUNTY WATER DISTRICT,
Plaintiff and Petitioner,

VS.

THE UNITED STATES OF AMERICA,
Defendant and Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Claims

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Plaintiff, Contra Costa County Water District, a local governmental entity of the State of California, prays that a writ of certiorari issue to review a decision of the United States Court of Claims.

ORDERS OF COURT OF CLAIMS

The Court of Claims made its orders, without opinion, granting defendant's motion for summary judgment, denying plaintiff's motion for summary judgment on the issue of liability alone, dismissing

plaintiff's petition, denying plaintiff's suggestion for a hearing en banc, and denying plaintiff's motion for rehearing. Copies of said orders are appended. (Appendices A and B).

JURISDICTION

The order of the Court of Claims granting defendant's motion for summary judgment and dismissing plaintiff's petition was made on January 17, 1975. The order denying motion for rehearing was made on February 28, 1975. The Court has jurisdiction by 28 U.S.C. § 1255.

QUESTIONS PRESENTED

1. Whether the Court of Claims, in this case and in *Southern Counties Gas Co. of Cal. v. United States*,[1] decided a federal question in a way in conflict with applicable decisions of this Court.

2. Whether destruction of the value and usefulness of property amounts to a taking in the constitutional sense even though the title and possession of the owner is not physically disturbed.

3. Whether the United States can avoid compensation for destruction of the usefulness of an easement by condemning title to the land "subject to" the easement.

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[1] 141 Ct. Cl. 28, 157 F. Supp. 934 (1958), *cert. denied*, 385 U.S. 815 (1958). A copy of the decision appears in Appendix C. It has been followed by the Court of Claims in a number of cases, for example, *Town of Kure Beach, North Carolina v. United States*, 168 Ct. Cl. 597 (1964).

4. Whether the constitutional right of due compensation can be denied on the basis of an unsound and outmoded ruling that the damage is "consequential".

5. Whether the property owner's right to recover compensation shall be measured by principles of fairness and equity as recognized by the Congress in the Real Property Acquisition Policy Act of 1970.[2]

CONSTITUTIONAL PROVISION INVOLVED

This is a case in inverse condemnation which involves the just compensation clause of the Fifth Amendment to the United States Constitution:

> ". . . *nor shall private property be taken for public use, without just compensation.*"

STATEMENT OF THE CASE

The plaintiff (hereinafter referred to as "the District") is a local governmental agency of the State of California engaged in providing a public water service for domestic, municipal, industrial and agricultural uses. The District is the owner of real property consisting of easements (pipes, valves and appurtenant facilities) within an unincorporated community known as Port Chicago in Contra Costa County, California, which property was used by the District as part of its water distribution system to deliver potable water to users in Port Chicago.

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[2] 42 U.S.C. 5652(a).

Commencing in 1968, the United States made a total acquisition of Port Chicago for a safety zone around the United States Naval Weapons Station, Concord, California. By negotiated purchase and four condemnation actions filed in the United States District Court for the Northern District of California, the United States has acquired the land wherein the District's easements and facilities are situated. The condemnation actions expressly provide that the title condemned by the United States is "subject to" easements for public utilities and existing rights of way for water pipelines. The District appeared in the condemnation actions but it was held that the District Court had no jurisdiction over the subject matter of the District's claim. [*United States v. 40.60 Acres of Land, etc., California*, 483 F.2d 927 (CA 9, 1973)].

The District then filed this action in inverse condemnation in the Court of Claims under the Tucker Act [28 U.S.C. § 1491]. The petition below is set forth in Appendix D. It alleges that after the government acquired Port Chicago it removed all surface structures, vacated streets, rescinded subdivisions and caused the land to revert to uninhabited acreage. As a result, the District's real property, which had a fair market value of $156,000 prior to the federal taking, was rendered completely useless and valueless. The prayer is for the value of real property taken, interest and litigation expenses. "Consequential" business losses of customer revenue, tax revenues, etc., are expressly disclaimed.[3]

[3]Appendix D, paragraph 12.

The United States moved for summary judgment and the District filed a cross-motion for summary judgment on the issue of liability alone. When the cause came before a panel of the Court of Claims, the presiding judge stated that the decision of the Court of Claims in *Southern Counties Gas Co. of Cal. v. United States*[4] was "controlling" and, without oral argument, granted the government's motion for summary judgment and dismissed the petition. Thereafter the District District seasonably moved for rehearing by the court en banc, which motion was denied on February 28, 1975, without oral argument.

ARGUMENT

I

IT IS UNJUST THAT THE DISTRICT BEAR THE LOSS CAUSED BY THE GOVERNMENT'S ACTIONS

Before the United States acquired Port Chicago, the District's operating water system was worth $156,000. Then, solely as a result of the actions of the government, the property became useless and valueless.

The District has not been compensated for its losses. The reasons given may be summarized thus:

1. the government expressly "excepted" the utility easements when it acquired title to the property;

[4]Decision is in Appendix C.

2. the District's pipes haven't been physically disturbed and are still capable of distributing water, and

3. the District lost *business*, i.e., customer revenue and tax base, not *property*.

Each of these arguments, hereinafter discussed in detail, is wholly without merit. The basic question of who bears the burden of the loss, the Federal taxpayers or the ratepayers and taxpayers of the District, has been answered by the decisions of this Court. Wholly apart from any business losses that may have been sustained, the Fifth Amendment entitles a property owner to compensation when by government action the value and usefulness of his *property* has been destroyed, despite the fact that the government may not have taken actual possession and exercised dominion over it.

Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 67 L.ed 287 (1922);

United States v. General Motors Corp., 323 U.S. 373, 89 L.ed. 311 (1945);

United States v. Causby, 328 U.S. 256, 90 L.ed. 1206, (1945).

As Justice Frankfurter said in *United States v. Dickinson*, 331 U.S. 745, 749, 91 L.ed. 1789, 1794 (1946), "The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure . . ."

II

BY DESTROYING THE USEFULNESS AND VALUE OF THE DISTRICT'S PROPERTY AND DEPRIVING THE DISTRICT OF ITS BENEFICIAL INTEREST THEREIN, THE GOVERNMENT HAS TAKEN THE DISTRICT'S PROPERTY IN THE CONSTITUTIONAL SENSE.

The provision of the Fifth Amendment prohibiting the taking of private property for public use without compensation is no longer limited to the situation where the government expressly takes title and physical possession of specific property and ousts the owner therefrom. The law is now clear that a taking occurs, and the right to compensation arises, when as a result of governmental action the owner is deprived of the *use and benefits* of his property, despite the absence of a physical appropriation of the property by the government.

In *United States v. General Motors Corp.*, 323 U.S. 373, 89 L.ed. 311 (1945), the government condemned a right of temporary occupancy of a building. In holding that a tenant of the building whose lease extended beyond the period condemned was entitled to recover moving expenses the court said:

> "The correctness of the decision of the court below depends upon the scope and meaning of the constitutional provision: 'nor shall private property be taken for public use, without just compensation', which conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs.
>
> "The critical terms are 'property', 'taken' and 'just compensation'. It is conceivable that the

first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's 'interest' in the thing in question. That interest may comprise the group of rights for which the shorthand term is 'a fee simple' or it may be the interest known as an 'estate or tenancy for years,' as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.

"In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right of interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." (Roberts, J., at pages 377-378).

In *United States v. Causby*, 328 U.S. 256, 90 L.ed. 1206 (1946), the noise accompanying low-level flights of military aircraft over respondent's land frightened his chickens to such an extent that the usefulness of the property as a commercial poultry farm was destroyed and the premises were made unfit and undesirable as a dwelling. In holding that acts of the government constituted a taking of the property within the meaning of the Fifth Amendment the court stated:

> "If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as completed as if the United States had entered upon the surface of the land and taken exclusive possession of it.
>
> "We agree that in those circumstances there would be a taking. Though it would be only an easement of flight which was taken, that easement, if permanent and not merely temporary, normally would be the equivalent of a fee interest. It would be a definite exercise of complete dominion and control over the surface of the land. The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed." (Douglas, J., at pages 261-262).

In *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 67 L.ed. 287 (1922), it was held that a taking of an interest in land occurred as a re-

sult of the firing of coast artillery over the company's land between the battery site and the shore. Although there was no physical invasion of the claimant's land, "depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made." (Holmes, J., at page 329).

United States v. Dickinson, 331 U.S. 745, 91 L.ed. 1789 (1946), involved a federal dam which caused intermittent flooding and bank erosion on land not expressly condemned. In allowing recovery pursuant to the Tucker Act, the Court said:

> "Property is taken in the constitutional sense when inroads are made upon the owner's use of it to an extent that, as between private parties a servitude has been acquired. . . ." (Frankfurter, J., at page 748).

In *Dugan v. Rank,* 372 U.S. 609, 10 L.ed. 2d 15 (1963), an injunction was sought by landowners downstream from a Bureau of Reclamation dam who claimed their water rights had been impaired. The Court dismissed on the grounds that the only relief available to the plaintiffs was under the Tucker Act. The Court pointed out (at page 625) that a taking did not require physical invasion of the property.

Nichols[5] calls destruction of usefulness of property a "non-physical" taking and states:

> "The modern, prevailing view is that any substantial interference with private property which

[5]Nichols, *The Law of Eminent Domain,* 3 edition, revised 1974, herein cited as *"Nichols"*.

destroys or lessens its value (or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed) is, in fact and in law, a 'taking' in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed. (2 *Nichols,* § 6.3, pp. 6-65).

* * *

"It is well settled that a taking of property within the meaning of the constitution may be accomplished without formally divesting the owner of his title to the property or of any interest therein. Any limitation on the free use and enjoyment of property constitutes a taking of property within the meaning of the constitutional provision. It is sufficient that the person claiming compensation has some right or privilege in the appropriated property, which right or privilege is destroyed, injured or abridged by such appropriation.

* * *

"Property in land is 'taken' whenever any one of the qualified privileges of which it is composed is taken. It has also been held that an interference with the *value* of private property may constitute a 'taking'.

"Constitutional rights rest on substance, not on form, and the liability to pay compensation for property taken cannot be evaded by leaving the title in the owner, while depriving him of the beneficial use of the property. It has already been shown that a legal restriction upon the use of land may constitute a taking, although the title is unaffected and the land is physically untouched, and the same is true when the owner's enjoyment of the land is physically interfered with, although

his legal rights remain unimpaired." (2 *Nichols*, § 6.1 [1] pp. 6-8, et seq.).

To argue that the usefulness of the District's pipes has not been destroyed because they are still capable of transporting water confuses *use* with *destruction*, ignores the fact that a taking need not be physical, and misses completely the point of *United States v. Causby, supra.* The usefulness of property—the beneficial interest of the owner therein—relates to the occupancy, operation and enjoyment thereof for its intended purposes. Mr. Causby's home and hen houses were not physically destroyed, they retained their capability of sheltering humans and chickens just as the District's pipes are still able to contain a flow of water. But the nature of the government's invasion was such that the intended uses of the property were taken away leaving the property without value. *United States v. Cress*, 243 U.S. 316, 61 L.ed. 746 (1917), quoted *infra* at page 20.

III

SOUTHERN COUNTIES GAS CO.[6] SHOULD NOT CONTROL THE DECISION IN THIS CASE

Th Court of Claims refused to hear oral argument of this case. The petition was dismissed on the grounds that *Southern Counties Gas Co.*, in which certiorari was denied, was "controlling".

Southern Counties Gas Co. arose out of the condemnation of land by the Corps of Engineers for a

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[6]The decision is in Appendix C.

flood control reservoir. As in this case, the government condemned the land "subject to existing easements for public utilities and pipelines". However, the main thrust of the complaint was for loss of business revenue and for the "falling off of customers". To this extent the Court properly denied the claim on the basis of the elementary principle that the constitutional right to compensation is for the value of *property* taken, not for the profits of *business* frustrated. *Omnia Commercial Co., Inc., v. United States,* 261 U.S. 502, 7 L.ed. 773 (1923).

The gas company also sought damages for the value of its underground pipes that were rendered useless when they were covered with several hundred feet of water. The Court also denied this claim, and to this extent, we respectfully submit the case was wrongly decided and should not be followed.

The entire decision in *Southern Counties Gas Co.* on the point involved in the case at bench is contained in the following two paragraphs:

> "As to the underground pipes we note initially that we are not concerned now with value, discussed in *United States v. General Motors Corp.,* 323 U.S. 373, 65 S.Ct. 357, relied upon by plaintiff. See, also, *United States v. Welch,* 217 U.S. 333, 30 S.Ct. 527, 54 L.ed. 787. We do not reach value unless the pipes have been taken, which we think is not the case. For the loss here too is due to the taking of the property of others, that is, of plaintiff's customers. A milk distributor, to use a rough analogy, might suffer loss by the turning of the area of a milk route into a public park. But this would not constitute a taking of

the route or of the instrumentalities by which it was served. The value of land and improvements might include an element due to their location on the route—a question we do not decide—but the loss to the milk distributor is a business loss.

"Though the line between a compensable and a noncompensable loss is sometimes a thin one, see *United States v. Welch*, supra, we think this case falls on the side of such cases as *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510, 43 S.Ct. 437, 438, 67 L.ed. 773, where it is said that 'for consequential loss or injury resulting from lawful governmental action the law affords no remedy.'"

In denying recovery for the loss of the value of the pipes, the decision was wrong for the following reasons:

1. Southern Counties Gas Co. fails to recognize that there can be a non-physical taking.

As we pointed out in II *(supra,* pp. 7-12), there can be a taking of property in the constitutional sense despite the fact that the government may not have physically seized the property nor have divested the owner of his possession and title. The failure of the Court of Claims to recognize this point is apparent from this statement in the decision ". . . we are not now concerned with value. . . . We do not reach value unless the pipes have been taken. . . ."

Normally it is true that a court doesn't reach the question of the amount of damages until it first determines if there is liability. But in the case now at bench, we are not concerned with "value" in the sense

of the amount recoverable, but rather as the interest of the owner which, if destroyed, would amount to a taking of his property. Thus the court is indeed concerned with and reaches value as the measure of the remaining usefulness, if any, of the property to the owner.

2. Southern Counties Gas Co. erroneously denied recovery on the grounds that the District's damage was "consequential."

The plaintiff's right to compensation cannot be avoided by describing its loss as "consequential" or the government's interference therewith as "indirect".

The "consequential loss" argument was raised in *Causby* (at p. 260) but received short shrift from the court: "In this case, as in *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 67 L.ed. 287, the damages were not merely consequential." (At page 265).

The term "consequential damages" does not have a fixed, generally-accepted meaning. On the contrary, it has been characterized as a "flabby standard"[7] . . . "much maligned . . . and somewhat dented."[8] Some courts and text writers use the phrase to describe recoverable severance damages.[9] Other authorities have used the adjective "consequential" to describe a vari-

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[7] *National By-Products, Inc. v. United States*, 405 F. 2d 1256 (Ct. Cl., 1969).

[8] *Adaman Mutual Water Co. v. United States*, 278 F. 2d 842, 846 (9 Cir., 1960).

[9] For example 1 Orgel *Valuation under the Law of Eminent Domain* (2d ed. 1953) § 54, p. 254, states there are "great practical and theoretic difficulties" in distinguishing types of damages. The editors therefore use the word "incidental" to describe those not recoverable.

ety of non-compensable damages including those unrelated to the value of the land (such as business losses).

> "The term 'consequential damage' is ambiguous in character, and is not truly relevant to any discussion respecting the different classes of damage. In the proper sense of the term, all damages must of necessity be consequential, since all damage is the consequence of an injurious act. The use of the term introduces an equivocation which is detrimental to any hope of a clear settlement of the question." (4A *Nichols,* § 14.1).

Compensation depends on the facts of the particular case, not on labels. *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 168, 2 L.ed. 2d 1228, 1236 (1958). We suggest that to deny compensation by describing a claimant's damage as "consequential" is to resort to a thought-saving formula. To lump all non-compensable damages under the label "consequential" and then deny recovery for a particular injury *because* it is consequential is to argue in a circle. The Constitution is "intended to preserve practical and substantial rights, not to maintain theories." *Davis v. Mills,* 194 U.S. 451, 457; 48 L.ed. 1067, 1071 (1904).

3. Southern Counties Gas Co. erroneously denied recovery on the grounds that the District's damage was due to the "taking of the property of others."

Neither *Southern Counties Gas Co.* nor the case at bench can be disposed of by such a simple statement. In both cases the utility pipes were interests in the very real property which the government acquired. As the Court of Appeals for the Ninth Circuit said in

Adaman Mutual Water Co. v. United States, 278 F.2d 842, 846 (1960):

> "Nonetheless, if an interest in land is lost as a result of the taking of the parcel to which the interest is attached, a direct connection with the physical substance condemned is established and the pitfalls of the consequential loss doctrine are avoided."

Moreover to contend that the District has not been damaged by the government, but by the "condemnation of the property of others," i.e., the District's customers, is another example of failing to comprehend the rule of *Causby.* This argument has no more merit than contending that Mr. Causby was damaged because the government condemned the property of others, i.e., the owners of the airport site. This very point arose in *Griggs v. Allegheny County,* 369 U.S. 84, 7 L.ed. 2d 585 (1962), where the court, following *Causby,* held that property was taken as a result of low-altitude overflights. The defendant argued that liability should rest on the airlines that operated the aircraft. The court rejected this argument and held that the defendant county, which operated the airport, was the "taker". Thus, the plaintiff recovered despite the fact his damage resulted from governmental taking and use of "property of others".

Armstrong v. United States, 364 U.S. 40, 4 L.ed 2d 1554, (1960), held that when the government took title to a ship and thus destroyed the lien of a materialman, the lien was held to be compensable property for which recovery was allowed, despite the fact that

the claimant's damage resulted from the government's taking "property of others".

4. The decision in Southern Counties Gas Co. is based on unsound reasoning.

The decision acknowledged that only a "thin line" separated the plaintiff's claim from compensability and offered, as the only support for the holding, the "rough analogy" of a milk distributor who could not obtain compensation if the area of his milk route were converted to a public park. A milk route can't be analogized to water mains. The route is intangible personalty—a list of customers akin to good will. The water mains are real property. *United States v. Welch*, 217 U.S. 333, 54 L.ed. 787 (1910). It is not the *route* but the *truck* that is comparable to the water mains. There is no right to compensation for the truck because it can be moved elsewhere and thus retains its usefulness.

Whatever reasoning may have led to the decision in *Southern Counties Gas Co.* in 1958, it is the result that is unconscionable and repugnant to contemporary notions of fairness and justice. The conversion of the community of Port Chicago into a safety zone for the Navy's weapons station at Concord is a federal project in the national interest. Should the Navy be allowed to destroy the District's property without paying for it? Should this unquestioned loss which proximately results from a project of nationwide benefit be borne by the taxpayers and ratepayers of the District? The answer is an emphatic "no". The full cost of a national project should be borne nationally,

and not assessed against the taxpayers and ratepayers of a local water district.

The Congress has declared the policy of the United States on this subject. In 1970, after Port Chicago was condemned, the Real Property Acquisition Policy Act[10] was enacted which expressly prohibits federal agencies from escaping payment for any interest in property which would be adversely affected by simply "excepting" the interest from the acquisition. We submit that the following portion of this Act (§ 302a) is declaratory of the decisional law of this Court:

> "Notwithstanding any other provision of law, *if the head of a Federal agency acquires any interest in real property in any State, he shall acquire at least an equal interest in all* buildings, structures, or other *improvements located upon the real property so acquired* and which he requires to be removed from such real property or *which he determines will be adversely affected by the use to which such real property will be put.*" (emphasis added).

IV

AN EXPRESS TAKING OF THE PLAINTIFF'S PROPERTY IS NOT PREREQUISITE TO COMPENSATION, NOR CAN THE GOVERNMENT ESCAPE ITS DUTY TO PAY JUST COMPENSATION BY EXCEPTING THE DISTRICT'S EASEMENTS FROM ITS CONDEMNATION ACTIONS.

The fact that the government did not expressly condemn the District's property right does not deprive the District of its right to compensation. A taking of property does not depend on the intent of the govern-

[10] P.L. 91-646; 84 Stat. 1904; codified as 42 U.S.C. §§ 4651-4655.

ment, rather it is a question of fact to be determined by all the surrounding circumstances.

Under the law it is the *character* of the invasion of the property owner's domain that determines whether a taking has occurred. *United States v. Cress*, 243 U.S. 316, 61 L.ed. 746 (1917), involved the periodic flooding of land (not expressly condemned) as the result of government construction of locks and dams to improve the navigability of a river. The court held:

> "But it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking. . . . The taking by condemnation of an interest less than the fee is familiar in the law of eminent domain. Where formal proceedings are initiated by the party condemning it is usual and proper to specify the precise interest taken, where less than the fee. But where, as in this case, the property-owner resorts to the courts, as he may, to recover compensation for what actually has been taken, upon principle that the Government by the very act of taking impliedly has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require (*United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656; *United States v. Lynah*, 188 U.S. 445, 465), and it appears that less than the whole has been taken and is to be paid for, such a right or interest will be deemed to pass as is necessary fairly to effectuate the purpose of the taking; . . ." (Pitney, J., at pp. 328-329).

In *United States v. Welch*, 217 U.S. 333, 54 L.ed. 787 (1910), recovery was allowed for the value of an

easement over condemned land although the government did not expressly condemn the easement. Justice Holmes speaking for the Court said:

> "A private right of way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United States as incident to the fee for which it admits that it must pay. But if it were only destroyed and ended, a destruction for public purposes may as well be a taking as would be an appropriation for the same end. *Miller v. Horton,* 152 Mass. 540, 547. The same reasoning that allows a recovery for the taking of land by permanent occupation allows it for a right of way taken in the same manner, and the value of the easement cannot be ascertained without reference to the dominant estate to which it was attached." (Pp. 328-329).

No doubt an exception from a taking would be proper if the owner were left with the benefits and usefulness of the property interest excepted. But here the government did not except the easements to be kind to the District. It expected the easements to avoid having to pay for them, knowing full well that what was left to the District was utterly worthless. The Court of Appeals for the Second Circuit in *United States v. Certain Property, etc.,* 306 F.2d 439 (1962), held a somewhat similar attempt to disclaim liability to be of no avail. There the government entered into lease agreement with the occupants of land being condemned which contained a release of "all claims, damages and causes of action arising from the acquisition of property of which the demised

premises are a part." The government contended that this clause was simply a "disclaimer" of the taking of any property that was removable by the lessees (p. 451). The court responded that what was taken was a question of fact and that the government's "interest as a taker in eminent domain is to pay 'the full and perfect equivalent in money of the property taken,' neither more nor less, not to use an incident of its sovereign power as a weapon with which to extort a sacrifice of the very rights the [Fifth] Amendment gives." (pp. 452-453, citations omitted).

CONCLUSION

On the issue of compensation for the loss of value of real property, the decision in *Southern Counties Gas Co.* was unsound and clearly contrary to the decisions of this court. The result is an unjust deprivation of the Fifth Amendment right to just compensation. The error of the Court of Claims in 1958 should now be corrected.

Respectfully submitted,

FREDERICK BOLD, JR.,
BOLD AND POLISNER,
Attorneys for Petitioner.

May 5, 1975.

(Appendices Follow)

Appendix A

In the United States Court of Claims

No. 420-73

Contra Costa County Water District

v.

The United States

Before DAVIS, *Judge,* Presiding, and KUNZIG, *Judge.*

ORDER

This case comes before the court on defendant's motion for summary judgment, filed February 28, 1974, and plaintiff's cross-motion for summary judgment, filed April 9, 1974. Upon consideration thereof, together with the briefs and oral statements of counsel, it is concluded on the basis of the decision by this court in *Southern Counties Gas Co. of California v. United States,* 141 Ct.Cl. 28, 157 F. Supp. 934 (1958), *cert. denied,* 358 U.S. 815 (1958), that plaintiff is not entitled to recover.

It Is Therefore Ordered that plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted and plaintiff's petition is dismissed.

Jan 17, 1975

By The Court
/s/ Oscar H. Davis
Oscar H. Davis
Judge, Presiding

Appendix B

In the United States Court of Claims

No. 420-73

Contra Costa County Water District

v.

The United States

Before DAVIS, *Judge,* Presiding, and KUNZIG, *Judge.*

ORDER

This case comes before the court on plaintiff's motion, filed January 30, 1975, for rehearing *en banc* pursuant to Rules 7(d) and 151(b). Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the six active Judges of the court (Judge Kashiwa not participating) as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b).

It Is Ordered that plaintiff's said motion for rehearing be and the same is denied.

Feb 28, 1975

By The Court
/s/ Oscar H. Davis
Oscar H. Davis
Judge, Presiding

Appendix C

157 Federal Supplement 934
United States Court of Claims.

Jan. 15, 1958.

No. 483-54.

Southern Counties Gas Company of California,

v.

United States.

FAHY, Circuit Judge, sitting by designation.

The case is before us on an agreed statement of facts. Under authority of the Act of August 18, 1941, 55 Stat. 638, 33 U.S.C.A. §§ 701b, 701c, note 701m, a flood control project, including a dam, has been erected by the Corps of Engineers, United States Army, to control the flood waters of the Rio Hondo and San Gabriel Rivers at the Whittier Narrows, four miles northwest of Whittier, California. In this connection the United States by condemnation proceedings or negotiations acquired fee title or flowage easements affecting a large area of land and improvements, situated above the dam and below the highest elevation to which the waters to be impounded could rise.

Plaintiff is a public service utility corporation supplying gas to domestic, industrial and commerical consumers in Southern California. It maintained and operated transmission lines, distribution lines, and service pipes under the surface of public streets and on private property in the area of the project, servicing 387 residential and 7 industrial, commercial, or agricultural customers. Its facilities were installed and maintained under easements from private owners and rights of way granted by the County of Los Angeles and the City of Montebello. Plaintiff was also possessed of private rights of way and easements for service pipes and connections granted by owners of property serviced.

The United States did not expressly acquire by condemnation or otherwise any of plaintiff's above described properties or rights. The declarations of taking and the condemnation complaint were stated to be subject to existing easements for public utilities and pipelines. The United States did, however, contract with plaintiff for the latter to relocate or abandon in place certain of its facilities and also to transfer to the United States its interest in some of its rights of way and easements.[1]

The United States has prohibited human habitation in the taking area and has caused to be razed or removed all structures therein except certain industrial

[1]Some areas were acquired by negotiation and purchase. Plaintiff's facilities, rights of way, easements or franchise rights located in and under the dam site and its appurtenant embankments, diversion channels, spillways and outlet works were paid for by the United States at their reasonable value.

structures which will be raised or buttressed against the maximum possible water elevation. Readjustment and closing of streets and alleys have been brought about by the United States.

If the owners did not desire to retain the improvements on land acquired by the United States, an effort was made by the United States to sell the same. Sales were public on terms which required the purchaser to remove the improvements at his expense. In other instances the United States demolished and removed the improvements. Before being removed, sold, or demolished plaintiff was notified and in some instances was instructed or requested to disconnect or remove its facilities from the premises. This the plaintiff did, blocking off the facilities and taking safety precautions. Plaintiff then abandoned in place the facilities so blocked off and disconnected. The cost of removing them would exceed the amount that could be obtained for them as salvage, so that their value represents a total loss to plaintiff.

Plaintiff's claim is for the value of those property rights and facilities in the area which the United States did not acquire by condemnation or otherwise and for which it has not contracted to pay plaintiff, and for its loss as a going concern in the taking area. The facilities are those which the Army Corps of Engineers has determined do not interfere with the project and are not required for continuance of service. Plaintiff's transmission and distribution facilities servicing 387 residential customers have been disconnected, blocked off, and abandoned. Of its facilities servicing

seven industrial consumers in the area, four likewise have been disconnected and abandoned.

As we have seen, the properties for which compensation is sought under the Fifth Amendment were not in terms taken by the United States. They were excepted from the declarations of taking and from the condemnation complaint. Use of the properties was brought to an end by the acquisition by the United States of the land of residential and industrial customers of plaintiff, followed by demolition or removal of improvements which had been serviced by plaintiff.

We think this was not, within the compensation provisions of the Fifth Amendment, a taking of the properties for which compensation is sought by plaintiff. Plaintiff's loss is due to the project, but in law is a consequential and noncompensable loss. This does not follow, however, merely from the fact that no express taking occurred. United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206.[2] In the circumstances of that case the Supreme Court held that a "flight easement," not taken in terms, was taken in law by the use of the air above claimant's land by aircraft flying low to and from an adjoining military airport. Unquestionably the Whittier Narrows Dam project has also resulted in the loss by plaintiff of the use and value of some of its properties, and this may be attributed in a sense to the use made by the United

[2]As in United States v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311, occurs this statement:

"Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

States of adjoining or appurtenant land. But the connection between the use referred to and the loss to plaintiff is indirect and falls within the principle which denies compensation for loss of business.[3]

As to the franchise, it seems clear that the falling off of customers, though caused by the project, was not a taking; the franchise became less valuable due to the changed situation in the area, but we cannot construe this as a taking of the franchise. So, too, as to the rights of way and easements. Loss of their use and value is also due to the removal of plaintiff's customers, "an unintended incident of the taking of land." Mitchell v. United States, 267 U.S. 341, 345, 45 S.Ct. 293, 294, 69 L.Ed. 644; Kellettville Gas Co. v. United States, D.C., 56 F. Supp. 919, 920. In so holding as to the easements and rights of way we read the agreed statement of facts as not presenting the case of destruction of the availability of easements and rights of way for servicing of premises which remain in the area. If there were land and improvements not taken which could be served by the aid of these easements and rights of way, except for the project, we would have a different question.

As to the underground pipes we note initially that we are not concerned now with value, discussed in United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 357, relied upon by plaintiff. See also, United States v. Welch, 217 U.S. 333, 30 S.Ct. 527, 54 L.Ed.

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[3]That business loss is noncompensable, see Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed. 1167; Mitchell v. United States, 267 U.S. 341, 45 S.Ct. 293.

787. We do not reach value unless the pipes have been taken, which we think is not the case. For the loss here too is due to the taking of the property of others, that is, of plaintiff's customers. A milk distributor, to use a rough analogy, might suffer loss by the turning of the area of a milk route into a public park. But this would not constitute a taking of the route or of the instrumentalities by which it was served. The value of land and improvements might include an element due to their location on the route— a question we do not decide—but the loss to the milk distributor is a business loss.

Though the line between a compensable and a noncompensable loss is sometimes a thin one, see United States v. Welch, supra, we think this case falls on the side of such cases as Omnia Commercial Co. v. United States, 261 U.S. 502, 510, 43 S.Ct. 437, 438, 67 L.Ed. 773, where it is said that "for consequential loss or injury resulting from lawful governmental action the law affords no remedy." There Monongahela Navigation Co. v. United States, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463, is distinguished, as it must be in the present case. See, also, Fix v. City of Tacoma, 171 Wash. 196, 17 P.2d 599.

It follows that plaintiff's petition must be dismissed.

It is so ordered.

JONES, Chief Judge, and MADDEN, WHITAKER and LITTLETON, Judges, concur.

Appendix D

In the United States Court of Claims

No. 420-73

Contra Costa County Water District,
Plaintiff,
v.
The United States of America,
Defendant.

[Filed Nov. 8, 1973]

PETITION

Plaintiff, Contra Costa County Water District, respectfully represents:

1. This action is brought under the provisions of 28 U.S.C. § 1491. Plaintiff's claim is founded upon the Fifth Amendment of the Constitution of the United States.

2. Plaintiff is a public body, corporate and politic, within the State of California, to wit, a County Water District organized and existing under the County Water District Law of the State of California (California Water Code, Division 12, §§ 30,000, et seq.).

3. For all times material hereto, plaintiff has been and is the owner of certain real property (here-

inafter referred to as "plaintiff's property"), consisting in easements, pipes, valves, and appurtenant facilities for the transportation and delivery of potable water within the unincorporated community in Contra Costa County, State of California, commonly known as Port Chicago. As used herein the words "Port Chicago" mean all the lands (except the right of way of the United States for its Contra Costa Canal and the right of East Bay Municipal Utility District for its Mokulumne Aqueduct) shown on the following maps:

> "Official Map of the City of Bay Point" filed in the office of the County Recorder of Contra Costa County, California, on August 17, 1908, in Volume 1 of Maps at page 24, as resubdivided by "Subdivision No. 1 of City of Bay Point" filed in the office of the County Recorder of Contra Costa County, California, on November 20, 1917, in Volume 16 of Maps at page 335.
>
> "Map of Bay Point Subdivision, Bay Point" filed in the office of the County Recorder of Contra Costa County, California, on June 22, 1920, in Volume 17 of Maps at page 370.

Plaintiff's property is delineated on Exhibit A* attached hereto and incorporated herein.

4. Defendant is now the owner in fee simple of all of Port Chicago. Defendant commenced the acquisition of Port Chicago in the spring of 1968 by negotiated purchases and thereafter completed the acquisition of Port Chicago by judgments entered in

*Exhibit A consisting in 8 maps and legend has been deleted.

the following condemnation actions filed in the United States District Court for the Northern District of California:

Civil No. 50344, *United States v. 40.60 Acres of Land, etc.* (Complaint filed November 20, 1968)

Civil No. 50443, *United States v. 168.62 Acres of Land, etc.* (Complaint filed December 6, 1968)

Civil No. 50501, *United States v. 536.20 Acres of Land, etc.* (Complaint filed December 23, 1968)

Civil No. 50680, *United States v. 158.51 Acres of Land, etc.* (Complaint filed January 29, 1969).

Each of the complaints in said actions alleged that the estate to be acquired by the United States in the lands therein described is the fee simple subject to, among other things, easements for public utilities and existing rights of way for water pipelines.

5. Plaintiff filed an appearance in each of said actions under the provisions of Rule 71 A (e) of the Federal Rules of Civil Procedure seeking just compensation for plaintiff's property. On August 29, 1973, the United States Court of Appeals for the Ninth Circuit entered judgment vacating the judgment of the district court and remanding the cause with instructions to quash plaintiff's notices of appearance on the grounds that plaintiff's property was not included in the property condemned by said actions and therefore the district court had no jurisdiction over plaintiff's claim. See *United States v. 40.60 Acres of Land,* 483 F.2d 927, (9th Cir. 1973).

6. Prior to the acquisition of Port Chicago by the defendant, plaintiff's property was used by plaintiff

as part of its water distribution system for the purpose of transporting and delivering potable water to water users in Port Chicago. The fair market value of plaintiff's property prior to the acquisition of Port Chicago by the United States was $156,000.00.

7. Since defendant acquired Port Chicago, defendant has prohibited human habitation therein, has razed or removed all buildings and surface structures thereon, has caused all streets, roads and alleys therein to be abandoned and the public easement therein to be vacated, and has rescinded the subdivision of Port Chicago and caused it to be reverted to acreage without streets, parcels or lots. Since acquiring Port Chicago, defendant has used and continues to use said land in connection with the United States Naval Weapons Station, Concord, California, as a safety zone to minimize the risk of damage and personal injury in the event of accidental explosion and said use does not require a water supply or in any way involve or require the use of plaintiff's property.

8. As a result of defendant's aforesaid acquisition and use of the lands of Port Chicago, the value and usefulness of plaintiff's property has been completely destroyed and plaintiff's property has been rendered, and now is, completely useless and valueless. Said acquisition and use of said lands by the defendant constitutes a taking of plaintiff's property for public use in the sense and meaning of the Fifth Amendment of the Constitution of the United States and plaintiff is entitled to just compensation therefor.

9. The just compensation to which plaintiff is entitled for the taking of plaintiff's property by the

defendant is the loss of the fair market value thereof which is the sum of $156,000.00.

10. The just compensation to which plaintiff is entitled for the loss to plaintiff of the reasonable value of the use of said monetary just compensation from and after the date of taking until payment thereof is made is ten percent (10%) per annum on said fair market value.

11. The just compensation to which plaintiff is entitled by defendant's refusal reasonably and promptly to acquire plaintiff's property in accordance with law and federal policy established by the Uniform Real Property Acquisition Act of 1970 (28 U.S.C. §§ 4651 to 4655) is the loss to plaintiff for litigation expenses and disbursements, including reasonable attorney, appraisal and engineering fees, incurred and to be incurred by plaintiff as a result of defendant's said refusal.

12. Plaintiff makes no claim against defendant for plaintiff's losses of customer revenue or other business losses, or plaintiff's losses of tax revenue by the removal from the tax rolls of property previously taxable by it to pay principal and interest on its outstanding bonds the proceeds of which were used to acquire plaintiff's property.

13. Defendant has not paid any compensation to plaintiff for the taking of plaintiff's property.

14. Plaintiff has not assigned or transferred this claim or any part of it.

Wherefore, plaintiff demands judgment against defendant for just compensation for the taking of plaintiff's property as follows:

1. The fair market value of plaintiff's property in the sum of $156,000.00;

2. The loss of use of said monetary compensation from the date of said taking to the date of payment thereof at the rate of ten percent (10%) per annum;

3. The litigation expenses and disbursements, including reasonable attorney, appraisal and engineering fees, incurred and to be incurred by plaintiff as a result of defendant's refusal to acquire plaintiff's property in accordance with law and federal policy;

4. Such other just compensation, damages and relief as this court deems proper.

Dated: November 3, 1973.

/s/ Frederick Bold, Jr.
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